IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

Smt. Usha Jain Vs. Trilok Chand Jain

S.B. CIVIL FIRST APPEAL No.163/2001 against the judgment & decree dated dated 8.3.2001 passed by the ADJ No.8, Jaipur City, Jaipur in Civil Suit No.515/1996.

Date of Judgment :: May 07, 2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. M.M. Ranjan for the plaintiff-appellant.
Mr. Sudesh Bansal for the defendant-respondent.

BY THE COURT:

1. This appeal of the plaintiff is directed against the judgment and decree of learned ADJ No.8, Jaipur City, Jaipur dated 8.3.2001 in an eviction matter in respect of private residential house wherein giving the benefit of first default in payment of provisional rent fixed by the learned trial court of Rs.1,000/-, the learned trial court refused to pass the eviction decree. The plaintiff appellant claimed rent at the rate of Rs.1,300/- per month and the provisional rent was fixed by the court at Rs.1,000/-, however, while passing the final judgment on 8.3.2001, the learned trial court directed the defendant tenant to pay the rent at Rs.1,300/- per month after adjustment of provisional rent fixed at Rs.1,000/- per month.

2. Mr. M.M. Ranjan, learned counsel for the appellant in the present appeal submitted that the defendant tenant has defaulted in payment of the said rent of Rs.1,300/- fixed by the learned trial court even during the pendency of this appeal and relying on the judgment of Hon'ble the Supreme Court in **Shiv Dutt Jadiya Vs. Ganga Devi** [(2002) 3 SCC 189] he submitted that defence of the defendant tenant deserved to be struck out in view of default of rent during the pendency of appeal also. This Court on 30.3.2007 passed a detailed order taking note of the aforesaid Supreme Court judgment and after hearing both the learned counsels and directed the learned counsel for the defendant tenant to file additional affidavit along with relevant evidence to satisfy this Court that whether entire rent said to be in default has been paid by the respondent tenant or not. The matter was kept on 10.4.2007. On 10.4.2007 also since such additional affidavit was not filed this Court struck off the defence of the defendant tenant and the matter was kept on 24.4.2007 for considering as to whether in view of such continuous default, the eviction decree could be passed in the matter.

3. On 24.4.2007 none was present on behalf of the respondent tenant and in the interest of justice the case was adjourned for one week and that is how the matter came up before the Court again on 4.5.2007 and the

arguments of both the counsels were heard at length. In the meanwhile, the respondent tenant filed an application on 24.4.2007 praying for recalling/ reviewing of the order dated 10.4.2007.

4. Mr. Sudesh Bansal, learned counsel for the respondent tenant submitted that reference to para 5 of the said application filed on 23.4.2007 that there is a dispute between the parties about monthly rate of rent as the appellant plaintiff claims rate of rent at the rate of Rs.1,300/- per month where the respondent alleges that the monthly rent of Rs.200/- only was payable. The learned trial court fixed provisional rent of Rs.1,000/- per month. He has further submitted in the said application in para No. 5 that the tenant paid rent upto February, 1995 at the rate of Rs.200/- per month, however, he deposited rent at the rate of Rs.1,000/- per month from 1.10.1992 to February, 2001 in compliance of the provisional determination U/s.13(4) of the Act, 1950. Thereafter tenant paid rent at the rate of Rs.1,300/- per month from March, 2001 to March, 2004 but thereafter rent was not paid under the bona fide impression that monthly rate of rent is yet to be decided in the present appeal. He, therefore, urged that this Court should now grant indulgence and opportunity to clear the arrears of rent at the rate of Rs.1,300/- per month as the respondent tenant did not pay the rent under the aforesaid bona fide

impression.

5. Mr. M.M. Ranjan on the side opposite strongly objected to the aforesaid submissions and urged that respondent tenant has deliberately defaulted in payment of rent during the pendency of appeal and when he himself admits in the aforesaid application that he paid rent at the rate of Rs.1,000/- in pursuance of the provisional determination by the learned trial court between the period 1.10.1992 to February, 2001 for about 10 years and thereafter from March, 2001 to March, 2004 for about 3 years at the rate of Rs.1,300/- per month, there was no justifiable reason and no question of any bona fide impression under which he could stop payment of rent to the appellant plaintiff. He, therefore urged, again relying on the aforesaid judgment in Shiv Dutt Jadiya's case (supra) that defence was rightly struck off by this Court in the order dated 10.4.2007 and the said order does not deserve to be recalled and on the other hand, the eviction decree deserves to be passed. He further submitted that the previous order dated 30.3.2007 clearly gave an opportunity to the respondent tenant to clear the entire arrears of rent at the rate of Rs.1,300/- per month when the Court granted opportunity to file additional affidavit with relevant evidence as to payment of entire rent and, therefore, there was no question of giving any further opportunity now at this stage and non

compliance of these previous orders clearly indicated that the respondent tenant had no intention of paying the arrears of rent.

6. After hearing both the learned counsels at length, this Court is of the opinion that the present appeal deserves to be allowed and eviction decree deserves to be passed against the respondent tenant. The Hon'ble Suprme Court in Shiv Dutt Jadiya's case overruling the earlier view of Rajasthan High Court in **Kamruddin Vs. Wahid Ali** [(1987) 1 RLR 290] clearly held that the requirement of payment of rent continuously is envisaged U/s.13 of the Act even during the pendency of the appeal and the pendency of litigation cannot be allowed to be used as an excuse by the tenant for suspending his obligation to regularly pay the rent and the landlord should not be compelled to file separate proceedings for recovery of rent falling due during the pendency of already filed eviction proceedings. In para 10 of the said judgment, the Hon'ble Supreme Court observed as under:-

> “10. Before parting, we would like to sound a note of caution. During the course of hearing a decision by the Rajasthan High Court in Kamruddin Vs. Wahid Ali was brought to our notice wherein the view taken by the High Court is that compliance with Section 13 of the Act need not be made during the pendency of appeal. We have taken a view to the contrary. To obviate the unforeseen difficulty which the

> tenants are likely to face in those matters which may be pending in appeal we would like to clarify that before striking out the defence under sub-section (5) or denying the benefit of relief against eviction under sub-section (6), for failure to comply with sub-section (4), of Section 13 of the Act during the pendency of appeal, the appellate court shall afford the tenant a reasonable opportunity for compliance, on this decision coming to or being brought to its notice. However, this judgment shall not be a ground for reopening any matter which stands already concluded."

7. From the aforesaid para 10 it is very clear that before striking out the defence under sub-section (5) or denying the benefit of relief against eviction under sub-section (6) for failure to comply with sub-section (4) of Section 13, during the pendency of the appeal the appellate court shall afford the tenant a reasonable opportunity for compliance. This was so done because the Rajasthan High Court view in Kamruddin's case was overruled by the Hon'ble Supreme Court. The judgment in Shiv Dutt Jadiya's case is dated 20.2.2002 and is reported in (2002) 3 SCC 189.

8. This Court is of the considered view that the aforesaid opportunity was definitely granted when the order dated 30.3.2007 was passed after hearing both the parties in which learned counsel for the respondent even raised a contention that the respondent tenant had paid excessive rent to the landlord but he could not satisfy

the Court and that is why a direction to file additional affidavit was issued. Instead of filing such additional affidavit when the order dated 10.4.2007 was passed striking out the defence instead of paying the arrears of rent to the appellant, the respondent tenant has filed an application for recalling of the said order. In the said application itself in para 5 there is clear admission that respondent tenant did not pay any rent after March, 2004 under the so called bona fide impression. This Court finds no place or occasion for respondent tenant to have entertained such so called bona fide impression which is nothing but a wholly unsustainable excuse for not making the regular payment of rent during the pendency of the appeal which is mandatory as held by the Hon'ble Supreme Court in Shiv Dutt Jadiya's case. When the respondent tenant himself paid the rent at the rate of Rs.1,300/- per month from March, 2001 to March, 2004 for three years in compliance of the impugned judgment and decree which of course gave him the benefit of first default. The respondent tenant should have been more than cautious, punctual and regular in payment of such monthly rent during the pendency of this appeal. If what learned counsel for the respondent tenant has argued was true, the very judgment of the Hon'ble Supreme Court in Shiv Dutt Jadiya's case is sought to be set at naught by the respondent tenant in the present case.

9. The reference to the Division Bench order dated 9.5.2003 in D.B. Civil Special Appeal No. 74/2003 in S.B. Civil Review Petition No.1/2002 in S.B.C.F.A. No.103/2001 at the instance of respondent tenant was made by the learned counsel for the respondent. A reference of that order dated 9.5.2003 rejecting the special appeal filed against rejection of a stay petition in connected S.B. Civil First Appeal No.103/2001, may be made here. The Division Bench in the said order came down heavily on the appellant, the present respondent tenant herein and observed that the said appeal was nothing but an abuse of the process of the Court because not only the appeal itself was filed against the interlocutory order rejecting the stay application filed before the learned Single Judge on 1st November, 2001 and such appeal was not maintainable but having filed a review petition and failed before the learned Single Judge, the respondent filed the said special appeal which was also dismissed with costs of Rs.1,000/- as the appellant, the present respondent tenant had abused the process of the Court. One fails to understand how the learned counsel for the respondent tenant seeks to draw any support from the said judgment against respondent tenant by which the appeal was dismissed with costs.

10. That as far as argument of learned counsel for the respondent tenant that there was dispute as to rate of

rent is concerned, the said argument is also misconceived. The learned trial court itself in the impugned order had directed arrears to be paid after adjustment of provisional rent of Rs.1,000/- at the rate of Rs.300/- per month which clearly meant that the final rent was determined at the rate of Rs.1,300/- per month. In the application filed by the respondent tenant in this Court on 24.4.2007 the respondent tenant has clearly admitted that he paid rent at the rate of Rs.1,300/- per month for the period March, 2001 to March, 2004 in para 5 of the said application, therefore, the contention is wholly misconceived that there was any bona fide dispute as to rate of rent. However, there was no justified explanation for stopping the payment of rent after March, 2004 and not clearing the arrears despite the order dated 30.3.2007 which was passed by this Court after hearing of both the sides. In view of this, the respondent is not entitled to benefit of first default any more and in view of further default during the pendency of the appeal, in view of Apex Court decision in Shiv Dutt Jadiya's case, eviction decree deserves to be passed.

11. Accordingly, the present appeal of the plaintiff deserves to succeed and the same is hereby allowed. The eviction decree be made immediately. The respondent tenant is directed to hand over the vacant and peaceful possession of the suit premises to the appellant within a

period of two months from today. The respondent tenant is further directed to pay the arrears to rent at the rate of Rs.1,300/- per month from April, 2004 till date within the aforesaid period of two months. If the vacant and peaceful possession of the suit premises are not handed over by the respondent tenant and arrears of rent are also not cleared within the aforesaid period of two months from today i.e. on or before 7.7.2007, the respondent tenant shall pay mesne profits to the appellant at the rate of Rs.5,000/- per month commencing from 1st August, 2007 and such mesne profits of Rs.5,000/- per month shall be paid before 15th of next month.

12. With the aforesaid observation, the appeal is allowed with no order as to costs.

(Dr.VINEET KOTHARI),J.

VS/